

No. 89-1741

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Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1989

DR. JOSEPH MURRAY HAYSE PETITIONER

versus

**BOARD OF TRUSTEES OF
THE UNIVERSITY OF KENTUCKY RESPONDENT**

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF KENTUCKY**

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June 7, 1990

QUESTION PRESENTED

Whether the Supreme Court of Kentucky erred in refusing to automatically promote to a tenured position an untenured professor who, through a procedural default, prevailed in a 42 U.S.C. §1983 suit against the University of Kentucky.

PARTIES

The University of Kentucky disagrees with Petitioner's statement that the caption of the case in this Court contains the names of all parties below.

As is apparent from the entire petition and all its appendices, Dean John B. Stephenson was a party below, and is not named in the caption.

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Respondent, the Board of Trustees of the University of Kentucky ("the University") respectfully requests this Court to deny Dr. Joseph Murray Hayse's ("Hayse") Petition For Writ of Certiorari concerning the Supreme Court of Kentucky's decision not to force the University to automatically promote Hayse to a tenured position. Hayse prevailed in his 42 U.S.C. §1983 suit against the University because a majority of the Supreme Court of Kentucky concluded that the University, through a procedural defect, had waived the defense of sovereign immunity. There is therefore no special or important reason for review, since the Supreme Court of Kentucky's decision that Hayse was not entitled to automatic promotion involved an unusual set of facts and does not conflict with the decisions of this Court or those of other courts.

COUNTERSTATEMENT OF THE CASE

Hayse taught at the University under a series of one-year contracts from 1971 through 1978. Because the University's traditional practice is to grant either tenure or a terminal reappointment at the end of a teacher's sixth year, Hayse was reviewed for tenure in 1977. He did not get tenure, so in February, 1977 he accepted a terminal reappointment for 1977-78. The Board of Trustees approved Hayse's terminal reappointment, along with the terminal reappointments of fourteen other professors, on May 3, 1977. The Board of Trustees did not review the files of any of those professors, because the authority to recommend

terminal reappointments had been delegated to the University's deans. On May 3, 1977 the Board of Trustees also approved various recommendations for tenure.

The University conducted Hayse's 1977 tenure review in exactly the same manner that it has always conducted everyone else's then, now, and before Hayse's time. The departmental chairman assembles a candidate's file, adds his own recommendation, then forwards the file to the appropriate dean. If the dean recommends tenure the file goes forward to an area advisory committee and then to the University's vice president, president, and Board of Trustees for further review. If the dean recommends against tenure the file stops with the dean, who notifies the candidate of that decision and offers a one-year terminal reappointment. This procedure conforms to the University's governing regulations, which authorize the University's president to delegate to the deans the authority to hire and terminate non-tenured professors. Area advisory committees are not assembled, nor are the University's upper administrators and Board of Trustees consulted, to review the dossiers of faculty members whose deans have recommended against tenure for them.

In February, 1978, as his terminal year was drawing to a close, Hayse appealed the University's rejection of his application for tenure. Hayse's chairman, Dr. Robert Evans, supported him in this endeavor. His dean, John B. Stephenson, appointed a three person

ad hoc committee to assist him in considering Hayse's appeal, even though neither the University's regulations nor its customary practice required him to do so. The entire committee recommended against tenure because Hayse's publication record was below the norm and did not inspire confidence in his future performance as a scholar. Dean Stephenson told both Hayse and Dr. Evans that Hayse's appeal had not been successful. Hayse refused to accept this decision, so Dean Stephenson agreed to forward Hayse's file to an area advisory committee and to the vice-president, even though the University's regulations did not require him to do so, and even though this additional review was not provided for anyone else. The vice-president and each of the members of the area advisory committee recommended against tenure. The vice-president sought the advice of the Dean of Graduate Studies, who recommended against tenure as well.

Hayse sued the University and Dean John B. Stephenson in March, 1979, pleading breach of contract. Under a special state statute not relevant here, Hayse was able to prosecute a contract claim against the University. Hayse added his constitutional claims on May 18, 1981, over two months after all parties had moved for summary judgment on the contract claims. In his Amended Complaint, Hayse claimed that his failure to get tenure resulted from an alleged feud between Dean John B. Stephenson and Dr. Robert Evans, and therefore violated his rights of free speech and association, equal

protection, and due process. On May 27, 1981 the trial court granted the University's motion for summary judgment on the contract claim. Hayse appealed. The Court of Appeals reversed the summary judgment, failed entirely to address the contract claim, and remanded for findings of fact on the constitutional issues, even though the trial court's summary judgment had gone only to the contract issue. No 42 U.S.C. §1983 issues were addressed on the first appeal, since Hayse did not even mention §1983 until 1985. On March 18, 1985 Hayse filed a Second Amended Complaint in which he expressly replead his constitutional claims and added §1983 claims. The University and Dean Stephenson raised common law sovereign immunity as a defense to the constitutional and §1983 claims, but the trial court refused to dismiss those claims on that basis.

After a seven-day trial of the constitutional and §1983 claims in March, 1986, a Franklin County jury returned a verdict of Sixty-One Thousand Seven Hundred and Sixty Dollars (\$61,760.00) in damages for Hayse. The Court entered a judgment in conformity with that verdict on March 19, 1986 and, in the exercise of its equitable powers, further ordered that Hayse be promoted to associate professor and granted tenure. The contract claim that gave rise to the first appeal has never been tried, and remains unresolved to this day. On July 3, 1986 the trial court granted the University's motion for judgment notwithstanding verdict and vacated its own order reinstating Hayse with tenure.

In an opinion issued December 11, 1987, the Kentucky Court of Appeals held that sovereign immunity barred Hayse's suit for damages on his constitutional and §1983 claims, but that he ought to be promoted and given tenure. On November 9, 1989, in a 4 to 3 decision, the Supreme Court of Kentucky reversed the Court of Appeals' decision, holding that Dean John B. Stephenson was personally liable for the award of damages and that Hayse was not entitled to automatic reinstatement with tenure. Rather, he was to be reinstated to his position prior to the alleged prohibited conduct, for tenure application under the regulations in effect during 1977-78. Three members of the Court, in a strong dissent, reasoned that the state's sovereign immunity cannot be lost or waived through procedural default; that Dean John B. Stephenson had been sued only in his official capacity and was therefore not a "person" under *Will v. Michigan Department of State Police*, _____ U.S. _____, 109 S. Ct. 2304 (1989); and that it was "manifestly clear" that Hayse would have been denied tenure anyway, because he had gotten his Ph.D. four years late and published no scholarly works during his employment with the University.

I. THE KENTUCKY SUPREME COURT'S DECISION NOT TO ORDER PROMOTION OF HAYSE TO A TENURED POSITION IS CONTROLLED BY THE EXTRAORDINARY PROCEDURAL FACTS OF THIS CASE AND RAISES NO SPECIAL OR IMPORTANT ISSUE.

A Writ of Certiorari is to be granted "only when there are special and important reasons therefor." Sup. Ct. R. 17.1. No such special or important reasons exist for granting Hayse's petition, given the unique substantive facts and the very unusual procedural history of this case.

It is true, as Hayse argues, that the Kentucky Supreme Court created an exotic species of "prospective injunctive relief" in ordering the University to engage in a *de novo* tenure review for Hayse. It is also true that this remedy would have been unauthorized under §1983, had the statute been applied properly to the facts of this case. The remedy is wrong, however, not because it gives Hayse too little, but rather because it gives him too much. In §1983 suits, prospective injunctive relief is available *only* against state officials acting in their official capacities. It is not available against a state university or its Board of Trustees, any more than it would be available against the state itself. *Kashani v. Purdue University*, 813 F.2d 843 (7th Cir. 1983), *cert. denied*, 484 U.S. 846 (1987); *Lee v. Western Reserve Psychiatric Rehabilitation Center*, 747 F.2d 1062 (6th Cir. 1984); *Bagg v. University of Texas*, 726 S.W.2d 582 (Tex. App. 1987).

In this case, by granting Hayse a personal, *de novo* tenure review by the Board of Trustees, the Kentucky Supreme Court gave Hayse “prospective injunctive relief” not against any state official but against the University itself. In arriving at this result, the Kentucky Supreme Court was able to ignore the rule that prospective injunctive relief is not available against the state because earlier in its opinion the court had erroneously concluded that the University waived its defense of sovereign immunity from Hayse’s entire suit by failing to raise the issue in response to Hayse’s initial complaint for breach of contract in 1979 and his initial appeal on his contract claim (a claim authorized by statute in Kentucky) in 1981¹.

Having thus dispensed with the problem of sovereign immunity, the court ordered a *de novo* review for Hayse, on the basis of its holding in *Brown v. Jefferson County Police Merit Board*, 751 S.W.2d 23 (Ky. 1988). In *Brown*, the court held that where an administrative body commits a procedural error the appropriate relief is to remand the case to that same administrative body for a decision on the merits, without the procedural error. This remedy was doubtless the most that the Supreme Court could

¹This unique “waiver” of a question of subject matter jurisdiction was held to apply even to Hayse’s §1983 claims, brought in 1985, even though the failure to assert sovereign immunity in the Court of Appeals took place some four years before the §1983 claims were even asserted.

possibly have given Hayse. It is more than the Court ought to have given him, because it requires the Board of Trustees to commit a procedural error through the unprecedented act of reviewing a tenure candidate's file after the candidate's dean has recommended against tenure. This does not conform to the University's regulations in effect in 1977-78, when Hayse was denied tenure. Not even Hayse has ever contended that the Board of Trustees personally reviewed the files of all candidates for tenure. Nevertheless, that result stems from the Supreme Court of Kentucky's interpretation of the law as applied to the unusual facts of this case.

To have automatically promoted Hayse to the tenured position he sought would have been to arbitrarily grant him a lifetime job at state expense. Such a promotion would have improved his *status quo ante* rather than restoring it; would have curtailed the University's freedom in the conduct of academic affairs in a way that courts have traditionally been reluctant to do; and would have pronounced Hayse qualified for the tenured professorship even though he received his Ph.D. four years late, has published no scholarly works at all, and has not taught for the past twelve years. There are no facts in this case sufficient to support the result Hayse urges. There is certainly no special or important reason for this Court to review the case to determine whether Hayse should be automatically promoted and given tenure.

II. NEITHER THIS COURT'S DECISIONS NOR THOSE OF ANY OTHER COURT MAKE PROMOTION TO A TENURED POSITION A MANDATORY REMEDY FOR A UNIVERSITY PROFESSOR WHO PREVAILS IN A 42 U.S.C. §1983 SUIT.

A. Reinstatement Is An Equitable Remedy To Be Sparingly Used.

There is no question that reinstatement is an equitable remedy to be sparingly used. Reinstatement is inappropriate where the person claiming wrongful termination is not qualified to serve in the position to which he seeks reinstatement. *Lee v. Walker County School Systems*, 594 F.2d 154 (5th Cir. 1979); *Locke v. Kansas City Power and Light Company*, 660 F.2d 359 (8th Cir. 1981). Likewise, it is well established that reinstatement after a lapse of many years stretches equity beyond its limits. In both *Decker v. North Idaho College*, 552 F.2d 872, 875 (9th Cir. 1977); and *Mims v. Board of Education*, 523 F.2d 711, 715 (7th Cir. 1975), the United States Court of Appeals for the Ninth and Seventh Circuits, respectively, held that automatic reinstatement after five years would not be appropriate. By that reasoning, automatic reinstatement after eleven years (much less the promotion with tenure sought by Hayse) would not be appropriate either. Moreover, to automatically reinstate a professor, give him tenure, and call that "prospective injunctive relief" is to nicely side step a state university's sovereign immunity against monetary damages. Such a promotion would give Hayse a benefit he likely would never have gotten otherwise, and would force the state

to pay for it for the duration of his career. By offering Hayse the opportunity for an extraordinary rehearing and actual review of his application for tenure by the University's Board of Trustees (which has never before reviewed the application of anyone not approved by his or her dean for tenure) the Kentucky Supreme Court has already done more than it should to correct any alleged procedural defect in Hayse's two previous tenure reviews.

B. This Court's Decisions Do Not Mandate Automatic Reinstatement With Tenure.

Contrary to what Hayse argues in his Petition, *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977) does not require that persons in Hayse's situation automatically be promoted and given tenure. In *Mt. Healthy, Doyle*, an untenured teacher with a rather scandalous work history, sued the school board after it refused to renew his contract because of his allegedly unprofessional conduct. Both the district court and the United States Court of Appeals for the Sixth Circuit held that Doyle was entitled to reinstatement with back pay. This Court took a much more conservative approach, remanding the case for a determination as to whether or not Doyle's contract would have been renewed anyway. The issue as to whether or not Doyle should be promoted with tenure never arose.

In *Perry v. Sindermann*, 408 U.S. 593 (1972) this Court held that a person claiming a property interest in a benefit such as tenure must have a legitimate claim

of entitlement to it. This Court further held that a mere subjective expectancy of a benefit such as tenure does not merit constitutional protection, but that Sindermann, a teacher in a state college without a tenure system, had a right to prove his claim of entitlement to tenure in light of the policies and practices of the college. Again, mandatory promotion with tenure was not at issue.

Hayse's claim that the Kentucky Supreme Court's remedy granting the University the power to determine whether or not Hayse should be reinstated conflicts with the holding of *Felder v. Casey*, 487 U.S. 131 (1988) is likewise without merit. *Felder* does not resemble this case in the least. The central issue in *Felder* was whether a Wisconsin statute requiring notice of claim prior to a state court suit against a local governmental entity or officer conflicted with the purposes and objectives of 42 U.S.C. §1983. This Court concluded that §1983 preempted the state statute.

In this case, Hayse has consistently insisted that the University would have given him tenure if only Dean Stephenson and Dr. Evans had not disliked each other. He has argued consistently that if *only* the University's Board of Trustees had reviewed his complete file he would have gotten tenure. He has never asserted that any tribunal other than the University's Board of Trustees has the authority to accept or reject his application for tenure; to the contrary, he has

steadfastly maintained that only the University's Board of Trustees had that authority. Now, however, he implies that the Board of Trustees cannot possibly make a fair decision, so this Court should dictate in advance what that decision ought to be. In short, he is asking the judiciary to oust the University's Board of Trustees.

C. The Federal Courts of Appeals Are Not In Conflict As To The Issues Of Automatic Reinstatement With Tenure.

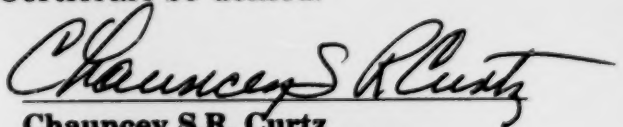
Hayse discusses a potpourri of cases from various United States Courts of Appeals in an effort to show conflict among the federal circuits as to the appropriateness of reinstatement as a remedy in §1983 cases, as well as a conflict between the decisions of those courts and that of the Supreme Court of Kentucky. His summary of the respective courts' views with regard to reinstatement is reasonably accurate, but the facts of the cases he cites vary widely both among themselves and from the facts of this case. He is essentially asking for an advisory opinion.

The consistent rule emerging from the cases Hayse cites is that reinstatement is always a discretionary remedy, to be considered on a case by case basis. This is so even in those circuits with decisions most favorable to Hayse's position, where a "presumption" of reinstatement exists. As the United States Court of Appeals for the First Circuit states in *Rosario-Torres v. Hernandez-Colon*, 889 F.2d 314, 320-22 (1st Cir. 1989), a "presump-

tion" of reinstatement is simply a "dress of thought, a shorthand manner of saying that equitable considerations different in kind or degree from those regularly accompanying reinstatement must be present if reinstatement is to be withheld from the victim of a First Amendment infraction." *Id.* at 323. The *Rosario-Torres* Court points out that those courts that accept a "presumption" of reinstatement still accord the trial judge considerable discretion in determining whether the presence of "non-incidental" considerations render reinstatement unwarranted. *Id.* fn. 8. In this case, the trial court ultimately concluded that Hayse was not entitled to reinstatement with tenure. Given the particular facts of this case, that result was correct. This case presents this Court with no reason to summarily order otherwise.

CONCLUSION

Respondent respectfully requests that Hayse's Petition for Writ of Certiorari be denied.



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